IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

October Term, 1948.

No. 4378.

UNITED STATES OF AMERICA,
Respondent-Appellant,

v.

PAUL C. WOODBURY,
Libellant-Appellee.

APPEAL FROM A FINAL DECREE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PAUL C. WOODBURY, APPELLEE.

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LAWYERS' BRIEF & PUBLISHING CO.
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BRIEF FOR PAUL C. WOODBURY, APPELLEE.

Jurisdiction.

This action was brought pursuant to the Public Vessels Act, 46, U.S.C. 781 *Et Seq.* The jurisdiction of this Court is based upon Section 128 of the Judicial Code, 28 U.S.C. Sec. 225a. This section was renumbered effective September 1, 1948, as 28 U.S.C. Sec. 1291 pursuant to the revision and recodification of the Judicial Code by Public Law 773, 80th Congress.

Statement of Facts.

The Appellee agrees with the statement of facts in paragraph one of the Appellant's brief, pages 2 and 3,

except the implication that the Sea Owl took and maintained a course of 000 degrees true.

The Court found, as asserted in the Appellant's brief (page 3), that at 10:27 the submarine Sea Owl reversed its course from 180° true to 000 degrees true. While the Court made no finding as to the exact course of the Sea Owl between the time she took a 000 degrees true course and the time of the collision with the Ariel, the testimony of those who had the means of knowledge as to her exact course would seem to require a conclusion that she failed to maintain that course.

At no place in the testimony of Commander Hall of the Sea Owl is there any statement that his vessel was on a 000 degrees true course at any time after she reversed from 180°. His testimony (R. 115) was that there was "no intentional change of course; we were maintaining station on the Falcon by visual; there was no ordered change of course." At the bottom of page 115 of the record he said, "I would state that within . . . a moderate (R. 116) amount in course, due to human errors in adjusting position on the Falcon, that there was no change in the course or ordered speed of the Sea Owl . . .".

The testimony of Lt. Cdr. Vaughan, Executive Officer of the Sea Owl at the time of the collision (R. 83 and 84; R. bottom of page 95 and top of page 96) was that the two gyro-compasses were not working well at all; it was varying from 90° to 125° in showing north; two-thirds of the maximum possible error; neither of the gyro-compasses were of any use whatsoever; the submarine took its course from the Falcon; all measurements recited in the log were measurements based upon the relationship of the submarine to the Falcon; the submarine was depending on the escort vessel for its course. (The Falcon's log indicates that during the Sea Owl's run which preceded the collision, the Falcon's engines were running so slowly or not

running at all, that she did not have enough way to maintain her own course.)

The testimony of Lt. Messick, Commanding Officer of the rescue vessel Falcon (R. 133 and 134; 135; 136), was to the effect that the Sea Owl, from the time she submerged (on a northerly course) to the time she fouled the gear of the Ariel, had gone between 200 and 300 yards westerly of a 000 degrees true course. A variation of 200 or 300 yards from true north would have put the Sea Owl considerably off the course that she was required to maintain, if she were the privileged vessel, which the Appellee denies.

The Appellee denies the concession that the signals "How and Peter" are one warning "that a submarine is headed for you at full speed under water" as asserted in the second paragraph of the Statement of Facts on page 3 of the Appellant's brief.

The Appellee denies the implication (last paragraph of the Appellant's Statement of Facts, pages 3 and 4 of the Appellant's brief) that there was no competent lookout on the Ariel at the time of and shortly before the collision occurred. The testimony of the witness Walter L. Blair (R. 39) was to the effect that he was lookout on the Ariel and paid no attention to the Sea Owl or the signals on the Falcon because they were so far away that there was no danger of a collision. After the Sea Owl submerged, he could not see her.

The Appellee also invites the attention of the Court to Finding 4 (R. 12) that is was customary in the area of the collision whenever a submarine's activities endangered fishing vessels, for the submarine or its escort vessel to come within hailing distance and warn the fishing vessel. It was usual for the escort vessel to remain constantly between the submarine and the fishing vessel. Such a finding was justified by the evidence. (R. 27; 44; 64.)

Statement of Points.

POINT I:

THE STATUTORY RULES RELATING TO BURDENED AND PRIVILEGED VESSELS ON CROSSING COURSES DID NOT APPLY UNDER THE CIRCUMSTANCES WHICH EXISTED AT THE TIME THE SEA OWL APPROACHED THE ARIEL UNDER WATER.

POINT II:

THE STATUTORY RULES RELATING TO SIGNALS TO BE DISPLAYED BY A VESSEL TOWING A SUBMERGED OBJECT DID NOT APPLY TO THE ARIEL WHILE SHE WAS TOWING A DRAGNET.

POINT III:

THE NEGLIGENCE OF THOSE IN CONTROL OF THE SEA OWL OR THE FALCON OR BOTH, WAS THE SOLE CAUSE OF THE COLLISION BETWEEN THE SEA OWL AND THE GEAR OF THE ARIEL.

Introduction and Summary of Argument.

The Ariel was in full view of the Sea Owl and the Falcon at all times and both vessels knew her course was steady. (R. 33; 76; 113.) The crew of the Ariel knew that it was the practice and custom of submarines, or escort vessels, or both, to warn surface vessels away if there were to be maneuvers which might result in possible danger to either vessel. (R. 27; 44; 64) (R. 12; F. 7.) The Sea Owl and the Falcon failed to follow the customary practice and usage in not warning the Ariel of the presence of a submarine in the vicinity (R. 27; 28; 37; 87; 88; 116; 134) and their failure to do so was a failure to observe obligatory regulations. Such failure constituted negligence and was the sole cause of the collision. The fact that the lookout of the

Ariel did not see the signals "How and Peter" flown from the yardarms of the Falcon, was of no importance since neither that vessel nor the Sea Owl were ever near enough while both were visible, to indicate that there was any danger of collision. (R. 39.) Vessels which are invisible, as the Sea Owl was, cannot be privileged.

A dragnet is not the type of submerged object which requires any signal to warn other vessels of its presence in the water. There is no inland rule which requires a fishing vessel to display signals that she is fishing and even if there were, the failure to show such signals could not have affected the conduct of the Sea Owl or the Falcon since the commanders of both vessels and the Executive Officer of the Sea Owl knew that she was fishing. (R. 87; 88; 89; 110; 111; 112; 127; 128; 131.)

There was no finding that the vessels were on crossing courses as stated by the Appellant on page 5 of its brief. The statement on page 6 of its brief that "these positions involved the risk of collision" were based upon the assumption by those in charge of the Sea Owl and the Falcon, that the Ariel's speed was five knots an hour. (R. 95; 118.) The Court found that it was 2½ knots an hour (R. 11, Finding 6), and the evidence warranted such a finding. (R. 23; 37; 49.)

POINT I:

THE STATUTORY RULES RELATING TO BURDENED AND PRIVILEGED VESSELS ON CROSSING COURSES DID NOT APPLY UNDER THE CIRCUMSTANCES WHICH EXISTED AT THE TIME THE SEA OWL APPROACHED THE ARIEL UNDER WATER.

The pertinent rules which apply to situations such as existed at the time of and before the collision are as follows:

"201. SUGGESTION FOR ASCERTAINMENT OF RISK OF COLLISION. Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist. (June 7, 1897, c. 4, Sec. 1, 30 Stat. 100.)"

"203. STEAM VESSELS APPROACHING, MEETING OR PASSING ONE ANOTHER; BANKS OBSTRUCTING VIEW; LEAVING DOCK. Art. 18 * * * Rule 9. The whistle signals provided in the rules under this article for steam vessels meeting, passing or overtaking, are never to be used except when steamers are in sight of each other, and a course and position of each can be determined in the daytime by a sight of the vessel itself, or by night, by seeing its signal lights.

"In fog, mist, falling snow or heavy rainstorms, when vessels cannot see each other, fog signals only must be used. (June 7, 1897, c. 4, Sec. 2, Stat. 669.)"

"206. VESSEL HAVING RIGHT OF WAY TO KEEP COURSE. Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed. (June 7, 1897, c. 4, Sec. 1, 30 Stat. 101.)"

"207: CROSSING AHEAD OF VESSEL HAVING RIGHT OF WAY. Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. (June 7, 1897, c. 4, Sec. 1, 30 Stat. 101.)"

"208. DUTY OF STEAM VESSEL TO SLACKEN SPEED. Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel

shall, on approaching her, if necessary, slacken her speed or stop or reverse. (June 7, 1897, c. 4, Sec. 1, 30 Stat. 101.)''

''211. RIGHT OF WAY OF FISHING VESSELS OR BOATS; OBSTRUCTION OF FAIRWAY. Art. 26. Sailing vessels underway shall keep out of the way of sailing vessels or boats fishing with nets, or line or trawls. This rule shall not give any vessel or boat engaged in fishing the right of obstructing a fairway used by vessels other than fishing vessels or boats. (June 7, 1897, c. 4, Sec. 1, 30 Stat. 102.)''

''212. SPECIAL CIRCUMSTANCES REQUIRING DEPARTURE FROM RULE. Art. 27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. (June 7, 1897, c. 4, Sec. 1, 30 Stat. 102.)''

Although the Sea Owl was on the starboard hand, she was submerged and therefore invisible to those on the Ariel. Under these conditions they could not know the location of the Sea Owl; and even if they could, it would have been impossible to keep informed of her course and speed or to check her position with accuracy.

In principle, the case is similar to one in which two vessels meet in a fog; The *Providence,* 282 Fed. 658; The *Admiral Watson,* 266 Fed. 122; or to two vessels, on opposite sides of a bend in a river, the high banks of which cut off their view of each other; The *Mercer,* 234 Fed. 259; or to vessels which are hidden from one another by structures on a pier, The *Pierpont,* 248 Fed. 682; The *John Riggs,* 234 Fed. 861; The *William A. Jamison,* 241 Fed. 950; The *Washington,* 241 Fed. 952; or to two vessels,

one of which is invisible to the other because of darkness," *Lind vs. U. S.*, 156 Fed. (2nd) 231. In such cases, the starboard hand rule does not apply. Such situations make applicable the special circumstances rule. (Article 27.)

The conditions which existed in *Lind vs. U. S.*, 156 Fed. (2nd) 231, are substantially the same as those of the case at bar except that the well-lighted fishing vessel, Mary, which was dragging and on a crossing course with the blacked-out Liberty ship, Abner Doubleday, had no lookout, had no one at the helm for twenty minutes before the collision and was not showing any lights as required by the International Rules, to indicate that she was fishing.

The Court, in stating that the case was one of special circumstances, said "All navigations rules presuppose that both vessels shall be in sight of each other and can continually check on each other's positions. When they are on crossing courses, one is selected which must 'keep out of the way' of the other and the other is held rigidly to her course and speed in order that the first shall be able to forecast the second's future positions, by which alone the first can do her duty. * * *"

"It was substantially impossible for the Mary to 'keep out of the way' of the Doubleday, for, not only could she not have made her out very far ahead, but if she had, she could not have learned the Doubleday's course and speed." The master of the Mary knew that "for many minutes and over a distance of three or four miles his vessel could have been seen by the approaching ship, and he would have been justified in supposing that a ship would shape her course to avoid him, counting upon the fact that he could not see her or do anything whatever to avoid her until she was near at hand. Moreover, he would have known that even when he did make her out, any act of avoidance by him would at best have been Blind Man's Buff. If he were well advised, the best he could have done for the safety

of both vessels would therefore have been to hold his own course and speed on the chance that any such approaching ship, knowing all that he did, would count upon his doing so. That was the navigation which the situation demanded."

It is difficult to believe that the starboard hand rule applies to a vessel which is invisible because she is under the surface in daylight but does not apply to a blacked-out surface vessel which the darkness of night hides from view.

Even if it could be held that the starboard hand rule did apply, the fault still lay with the Sea Owl. From the testimony of those in charge of her (R. 83, 84, 95, 96), it must be inferred that she had no means of knowing her exact position or course at any given time, since "neither of her gyro-compasses were of any use whatsoever." If she took a 000 degrees true course from the Falcon when she first submerged, she could not maintain that course with any certainty. The additional testimony of Lieutenant Messick of the Falcon (R. 133, 134, 135, 136), that in a distance of fourteen hundred yards, or less, the Sea Owl travelled between two and three hundred yards west of the course which the rules required her to maintain, proves her inability to maintain course. If she had performed the duty required of her by the starboard hand rule, namely, to maintain a course of 000 degrees true, there could have been no collision since she would have crossed the Ariel's bows with at least two hundred and possibly three hundred yards to spare.

If the situation was one to which the starboard hand rule applied, and the Sea Owl did not maintain her course and speed, as a result of which the collision occurred, her failure to do so was the sole cause of the collision, regardless of any action the Ariel would have been required to take if the Sea Owl had been visible on the surface. The

Governor Ames, 187 Fed. 40; *Havre Maru,* 16 Fed. (2nd) 483; same case The *Hallgrim,* 20 Fed. (2nd) 720; *James A. Lawrence,* 117 Fed. 228; *Robert Dollar,* 160 Fed. 876; 277 Fed. 36.

Point I of the Appellant's brief has no application in the circumstances under which the collision between the Sea Owl and the Ariel occurred.

POINT II.

THE STATUTORY RULES RELATING TO SIGNALS TO BE DISPLAYED BY A VESSEL TOWING A SUBMERGED OBJECT DID NOT APPLY TO THE ARIEL WHILE SHE WAS TOWING A DRAGNET.

Apparently the question of whether or not a trawl which is being dragged by a fishing vessel is a submerged object under Pilot Rule 312:18, has never been decided.

The communication from the Commandant of the Coast Guard dated February 17, 1948, addressed to Mr. Justice Wyzanski (R. 14, Conclusion 2) in which it is stated that when Pilot Rule 312:18 was proposed for adoption and was adopted, those concerned with its promulgation were mindful of entirely different types of tows and gave notice only to wrecking and salvage and not to fishing interests, would seem to warrant the conclusion of the Court below that this rule was never intended to apply to fishing vessels or their gear.

The fact that the question has never been raised before would seem to be a further indication that the rule was never intended to apply to fishing vessels.

Article 9(d) and 9(k) of the International Rules provides as follows (Title 33, U. S. C. Sec. 79):

> "(d) Vessels, when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea—

First: If steam vessels, shall carry in the same position as the white light mentioned in Article 2a (on or in front of the foremast or in the forepart of the vessel at a height above the hull of not less than twenty feet), a tri-colored lantern so constructed and fixed as to show a white light from right ahead to two points on each bow, and a green light and a red light over an arc of the horizon from two points on each bow to two points abaft the beam on the starboard and port sides respectively; and not less than six nor more than twelve feet below the tri-colored lantern a white light in a lantern * * *''

"(k) All vessels * * * fishing with * * * trawls, when underway, shall in the daytime indicate their occupation to an approaching vessel by displaying a basket or other efficient signal where it can best be seen * * *."

Article 9(c) of the Inland Rules (Title 33; Sec. 178) provides as follows:

"All vessels, when * * * fishing with any kind of drag-nets or lines, shall exhibit from some part of the vessel where they can best be seen, two lights. One of these lights shall be red and the other shall be white. The red light shall be above the white light, and shall be at a vertical distance of not less than six feet, not more than twelve feet * * *".

There is no provision in the Inland Rules as to what signals, if any, a vessel dragging, must display in daylight.

Pilot Rule 312:18 relating to vessels towing submerged objects provides as follows:

"312.18 SIGNALS TO BE DISPLAYED BY A TOWING VESSEL WHEN TOWING A SUBMERGED OR PARTLY SUBMERGED OBJECT UPON A

HAWSER WHEN NO SIGNALS ARE DISPLAYED UPON THE OBJECT WHICH IS TOWED.—The vessel having the submerged object tow shall display by day, where they can best be seen, two shapes, one above the other, not less than 6 feet apart, the lower shape to be carried not less than 10 feet above the deck houses. The shapes shall be in the form of a double frustum of a cone, base to base, not less than 2 feet in diameter at the center nor less than 8 inches at the ends of the cones, and to be not less than 4 feet lengthwise from end to end, the upper shape to be painted in alternate horizontal stripes of black and white, 8 inches in width, and the lower shape to be painted a solid bright red.

"By night the towing vessel shall display the regular side lights, but in lieu of the regular white towing lights shall display four lights in a vertical position not less than 3 feet nor more than 6 feet apart, the upper and lower of such lights to be white, and the two middle lights to be red, all of such lights to be of the same character as is now prescribed for the regular towing lights."

It is significant that both the International and Inland Rules require entirely different types of signals and lights for fishing vessels than Pilot Rule 312:18 requires for vessels towing submerged objects. It seems unlikely that vessels fishing with submerged trawls are required to carry both sets of signals in daylight and both sets of lights at night. The confusion resulting from such requirement would lead to more collisions and disaster than would be prevented by displaying both sets of lights and signals, one indicating that she was fishing and the other, that she was towing a submerged object.

Since it is a matter of common knowledge that there is no lawful method of taking fish without having some kind

of apparatus submerged, knowledge that a vessel is fishing necessarily imputes knowledge that she has some kind of a submerged object in tow if she is moving. Signals indicating that she was towing such submerged apparatus could give no additional information to any vessel which saw them. The Appellee submits that a reasonable interpretation of both the International and Inland Rules requires the conclusion that Pilot Rule 312:18 cannot apply to vessels towing fishing apparatus of any kind.

POINT III.

THE NEGLIGENCE OF THOSE IN CONTROL OF THE SEA OWL OR THE FALCON OR BOTH, WAS THE SOLE CAUSE OF THE COLLISION BETWEEN THE SEA OWL AND THE GEAR OF THE ARIEL.

Article 26 of the Inland Rules (Title 33, U. S. C. A. Sec. 211) provides that *Sailing vessels underway shall keep out of the way of sailing vessels or boats fishing with nets or lines or trawls. This rule shall not give any vessel or boat engaged in fishing the right of obstructing a fairway used by vessels other than fishing vessels or boats.*

This rule applies to fishing boats using power as well as to others. Marshall O. Wells, 178 Fed. 918; *Josie, Virginia and Joan,* (D. C. Mass.) 19 F. Supp. 419; 136 A. M. C. 244.

The general rule is for all vessels to keep clear of fishing vessels because such vessels are hampered and it follows that unhampered vessels should keep clear. Knights Modern Seamanship, (10th Edition, Revised to 1941) 429.

Since there was no evidence that the Ariel was obstructing a fairway used by vessels other than fishing vessels or boats, the Sea Owl should have kept away from her. *Marshall O. Wells, Supra; Horst vs. Columbia Construction Co.,* 89 Ore. 344; *Perth Amboy Drydock Co.,* 172 Fed. 984; *The Albatross,* 20 Fed. (2nd) 17; *The New Moon,* 55 Fed. (2nd) 928; *Johnson vs. American Tugboat Co.,* 85 Wash. 212.

The testimony of Commander Hall of the Sea Owl and his Executive Officer, Lt. Cdr. Vaughan, required a finding that the Ariel was in full view of the Sea Owl until she submerged to pass under the Ariel. (R. 76; 113; 133.) If they knew that the Ariel had not seen them and that if she kept her course, a collision would result, the Sea Owl could not rely on her privilege, if she had one. The case was of special circumstances. The Sea Owl's not changing her course to avoid the collision made her at fault for causing it. *The Our Friend,* 142 Fed. 274.

In *The Westhall,* 153 Fed. 1010, the Court held that where a vessel on which rested the burden to avoid a collision, was chargeable with faults sufficient in themselves to account for the collision which occurred, she cannot escape liability on the suggestion of possible fault on the part of the other vessel, which is entitled to the benefit of all reasonable doubts. *Esparata,* 160 Fed. 289.

Failure of the Sea Owl to change her course when she saw that a collision would result if she did not do so, did not absolve her from liability if the dangerous situation in which she found herself resulted from her own negligence. Her commander, in undertaking to dive under the Ariel when it was too late to change his course, or stop or reverse, was not acting *in extremus* so as to excuse his violation of the rules. *The Morenga,* 211 Fed. 355; *Abangarez,* 60 Fed. (2nd) 543.

The Ariel had a right to assume that the Sea Owl would conform to the requirements of the established custom that she would be warned away if there was any danger of a collision between her and the Sea Owl. *Agnella,* 198 Fed. 147 confirmed in 204 Fed. 440. Local customs and usages have the effect of obligatory regulations. Under them, if followed, collisions need never occur unless by some negligence or inattention which no rules can prevent. *Agnella, supra; The Victory,* 168 U. S. 410. The Ariel was justified

in assuming that the Sea Owl or the Falcon or both would perform their duty as established by local custom and usage, to warn her of any danger which may have existed. Such assumption on her part was no evidence of negligence. *The Sagamore,* 247 Fed. 743.

Even if it should be found that the Sea Owl was privileged while she was invisible to the Ariel, she would still be at fault if she changed her course or failed to show her course. *The Hallgrim,* 20 Fed. (2nd) 720; *same case Havre Maru,* 16 Fed. (2nd) 483. And this is so even though she acted with the best intention (or because of her lack of navigating equipment). *The Donau,* 49 Fed. (2nd) 799.

In Lind vs. U. S., supra, the Court said, at page 232, "To run down a brilliantly lighted vessel, crawling along at less than three miles an hour, which does not change her course or speed, while one is one's self completely blacked out; that was no gross and strange an aberration of seamanship as to warrant no discussion". The fault of the Doubleday in that case was no greater than the fault of the Sea Owl in the present case. The fault of the Mary, however, was much greater than any alleged fault of the Ariel in that the Mary had no lookout at all and was displaying no lights as required by International Rules. Inland Rules under which the Ariel was fishing required no such signal (the evidence [R. 30, 35] warranted a finding that the Ariel was carrying a keg in her rigging although the evidence also warranted a finding that it was placed there for convenience rather than for a signal. It is submitted that the keg in the rigging complied with International Rules, Article 9 (k) [Title 33; sec. 79] even though such compliance may have been unwitting or accidential. *Lind vs. U. S., supra.* at page 234, last sentence of the opinion.)

When fault of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for the vessel at fault to

raise a doubt with regard to the management and control of the other vessel. *The City of New York,* 147 U. S. 72. *The Victory and Plymouthonian* 168 U. S. 410. *In Lind vs. U. S., supra,* the Court said, at page 233, "The failure to carry regulation lights was relieved only so far as its presence misled or could have misled those abroad the Doubleday as to the Mary's position." The Court went on to say that in view of the Mary's visibility; that the Doubleday had seen her long before the accident on a steady course and constant bearing, without either vessel having changed its course, that it would be impossible to suppose that presence of a green light on the masthead of the Mary possibly could have changed the navigation of the Doubleday. At page 234 the Court said further "The libelant, (The Mary), should not be charged with fault, however morally culpable, which in fact resulted in the safest navigation open to them under the circumstances.

The Sea Owl was negligent in not having a proper steering compass if the lack of one was responsible for some of the departure from her course. *The Agwidale (D. C.—N. Y.)*, 62 F. Supp. 500; 1945 AMC 995).

Conclusion.

The Judgment of the Court below should be affirmed.

Respectfully submitted,

ALFRED W. HOWES,
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